Supreme Court, U.S.
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OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

TIMOTHY J. OWEN,

Petitioner,

v.

STEPHEN P. SANDS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should vacate the California decisions and remand the case for consideration of the Petitioner's due process claims under the Fourteenth Amendment to the United States Constitution.

2. Whether the Court should vacate the California decisions and remand the case for resolution in the first instance of whether the automatic suspension and revocation provisions of Business & Professions Code § 7090.1 are constitutional.

PARTIES TO THE PROCEEDING

This case involves a California contractor disciplinary matter in which the Petitioner, Timothy J. Owen, dba Chabot Construction, was a licensed building contractor until his license was automatically suspended and revoked by operation of law.

The Respondent is Stephen P. Sands, Registrar of Contractors, Contractors' State License Board.

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OPINIONS BELOW

The *en banc* decision of the California Supreme Court (Pet. App. 1a) to deny the Petition for Review is unpublished. The Opinion of the California Court of Appeal, First Appellate District (Pet. App. 2a-15a) is published at 176 Cal.App.4th 985. The decision of the California Court of Appeal to deny the Petition for Rehearing (Pet. App. 16a) is unpublished.

JURISDICTION

The California Supreme Court issued its decision in this case on November 19, 2009. Mr. Owen filed a Petition for Writ of Certiorari on February 17, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CALIFORNIA STATUTORY PROVISIONS INVOLVED

The Petitioner is challenging the constitutional validity of Business & Professions Code ("B&PC) § 7090.1, which provides for the automatic suspension and revocation of a contractor's license for "fail[ing] to pay a civil penalty, or to comply with an order of correction or an order to pay a specified sum to an injured party in lieu of correction once the order has become final, ..."

The application of B&PC § 7090.1 to contractor citation proceedings under B&PC § 7099 results in the suspension and revocation of a contractor's license by merely alleging contractor misconduct.

Relevant portions of these statutes and other related California statutes can be found at Pet. App. 20a-25a.

STATEMENT OF THE CASE / FACTS

This case involves a contractor disciplinary proceeding and the interplay of several statutes that creates a loophole for the Registrar of Contractors to suspend and revoke a contractor's license by a mere preponderance of the evidence. The proper standard of proof in a contractor disciplinary action that results in the suspension and revocation of a contractor's license has always been clear and convincing evidence to a reasonable certainty.

1. Timothy J. Owen ("Owen") had been licensed as a classification B General Building contractor under a license issued by Stephen P. Sands, Registrar of Contractors ("Registrar"), on September 17, 2005. Clerk's Transcript ("CT") 22 ¶ 1.[1]

2. On July 17, 2006, the Registrar issued a citation to Owen with respect to a residential window replacement project. CT 22, ¶ 2; CT 23 ¶ 3. B&PC § 7099 authorizes the Registrar to issue citations to licensees or applicants. The Citation alleged six violations of the Business & Professions Code: (1) B&PC § 7028 (a misdemeanor); (2) B&PC § 7109(a); (3) B&PC § 7113; (4) B&PC § 7159; (5) B&PC § 7116;

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[1] The "CLERK'S TRANSCRIPT ON APPEAL" is the official record on appeal in this case, which was filed with the Court of Appeal on October 30, 2008.

and (6) B&PC § 7125(b) (a misdemeanor). CT 23-24 ¶ 3. On August 4, 2006, Owen filed an appeal that contested the alleged violations in the citation, as well as the entire sum of the civil penalties sought by the six respective citation items. CT 24 ¶ 4. *See* B&PC § 7099.3 (providing for appeal of citation).

3. Proceedings were conducted under the Administrative Procedure Act (Government Code ("GC") §§ 11500 – 11529). *See* B&PC § 7099.5 (providing for hearing conducted in accordance with Government Code, commencing with Section 11500). The Administrative Law Judge ("ALJ"), in a Prehearing Conference Order, stated that "[t]he standard of proof for establishing cause for discipline under the Citation is a preponderance of the evidence." CT 54 ¶ 2.

4. Owen objected to the preponderance of the evidence standard of proof by filing a document entitled "Standard of Proof" arguing that the standard of proof for Items No. 1 and 6 of the Citation should be proof beyond a reasonable doubt, and the standard of proof for Items No. 2 – 5 should be clear and convincing proof to a reasonable certainty. CT 60-65.

5. After a four-day hearing, CT 22, the ALJ rendered his Proposed Decision. CT 22-52. *See* GC § 11517(c)(1). Notwithstanding Owen's objection to the standard of proof, the ALJ stated that "the burden of proof is on Complainant, by a preponderance of the evidence, to establish that the Citation items should be sustained that causes exist for discipline against Respondent." CT 42.

6. On September 6, 2007, the Registrar adopted the Proposed Decision of the ALJ as his Decision, making the decision effective on October 8, 2007. CT 21. *See* GC § 11517(c)(2)(A). The Registrar ordered

payment of the $2,000.00 civil penalty due on or before October 25, 2007, and the correction order of $7,880.79 to the homeowner due on or before October 29, 2007. CT 21.

7. Owen did not comply with the civil penalty order and correction order, CT 5:26-27, 67:25-26, because Owen believed that compliance with the Registrar's Decision moots the issues on appeal. CT 18:16-21.

8. On November 7, 2007, Owen filed a timely Petition for Administrative Mandamus (Code of Civil Procedure ("CCP") § 1094.5); Request for Stay of Registrar's Decision (CCP § 1094.5(h)); Memorandum in Support of Petition and Stay; Exhibits A – C; Verification; and Proof of Service in the Alameda County Superior Court. CT 1-66. The Registrar filed an Answer. CT 67-70.

In his Verified Petition, Owen claimed:

> Respondent violated Petitioner's due process rights under the Fourteenth Amendment to the United States Constitution by failing to proceed in a manner required by law, in that the adopted Proposed Decision by the Administrative Law Judge applied the preponderance of evidence standard of review. The proper standard of review in an administrative hearing to discipline a professional licensee is clear and convincing proof to a reasonable certainty, not merely preponderance of the evidence.

Verified Petition, at 2. CT 6.

In the Memorandum to the Verified Petition, Owen argued that "Respondent violated Petitioner's due process rights under the Fourteenth Amendment to

the United States Constitution by failing to proceed in a manner required by law." Memorandum, at 13. CT 17.

9. Because the Court never ruled on the request for stay, Owen's contractor's license was suspended by operation of law on November 24, 2007, and revoked by operation of law on February 22, 2008. *See* B&PC § 7090.1(a)(1) (suspension) and B&PC § 7090.1(a)(4) (revocation).

10. The Petition for Administrative Mandamus was heard and denied by the Superior Court on March 13, 2008. Pet. App. 18a-19a (CT 85). The Court also denied the request for stay as moot. Pet. App. 19a (CT 85). The Judgment denying the Petition was entered on April 11, 2008. CT 87-88. A Notice of Entry of Judgment was filed on April 30, 2008. CT 89-92. Owen filed a timely Notice of Appeal. CT 93-95.

11. In his Opening Brief to the Court of Appeal, Owen argued, among other things, that B&PC § 7090.1 was unconstitutional because:

> [t]he automatic suspension and revocation provisions of B&PC § 7090.1 do not provide for a hearing, and therefore, the statute does not comply with the due process provisions of the Fourteenth Amendment. 'The fundamental requisite of due process of law is the opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394 (1914). A hearing to suspend or revoke Owens's license would have undoubtedly required the Registrar to prove the allegations by clear and convincing evidence to a reasonable certainty."

Opening Brief, at 15.

12. In Sands' Respondent's Brief, he argued that B&PC § 7090.1 was constitutionally valid. Respondent's Brief, at 11-15. He concluded that "section 7090.1 contemplates three levels of due process protections before a contractor's license may be suspended." Respondent's Brief, at 14.

13. In his Reply Brief, Owen again argued that B&PC § 7090.1 was unconstitutional:

> A proper solution under the Constitution is to provide a hearing *before* the Registrar automatically suspends or revokes his contractor's license. The Supreme Court has held that "unless the statute expressly provides to the contrary a license cannot be revoked without a hearing where the statute contemplates a quasi judicial determination by the administrative agency that there be cause for the revocation; that because of reasons of justice and policy the statute will be interpreted to require a hearing." Fascination, Inc. v. Hoover (1952) 39 Cal.2d 260, 271 (citations omitted).

Reply Brief, at 8.

14. After briefing by the parties, the Court of Appeal filed an unpublished Opinion on July 28, 2009. Pet. App. 2a-15a. The Court concluded that "the preponderance standard was appropriate in the citation proceeding because the only potential sanctions were orders of correction and civil penalties." Pet. App. 5a (Opinion, at 3). The Court also noted that the clear and convincing evidence standard of proof "would apply in a proceeding seeking suspension, or revocation of a contractor's license." Pet. App. 6a (Opinion, at 4). The Court of Appeal failed to address Owen's constitutional challenge to B&PC § 7090.1.

15. On August 8, 2009, the Registrar filed a request to publish the Opinion.

16. Frustrated by the Court of Appeal's failure to address Owen's constitutional concerns, on August 11, 2009, Owen filed a Petition for Rehearing requesting that the Court of Appeal rule on the constitutional validity of B&PC § 7090.1, arguing:

> The Court of Appeal failed to address the constitutional validity of B&PC § 7090.1. Petition for Rehearing, at 2-3.
>
> The Court of Appeal failed to address the conflict between B&PC § 7090.1 and B&PC § 7099.6. Petition for Rehearing, at 3-7.
>
> The Court of Appeal failed to consider that B&PC § 7090.1 is unconstitutional to the extent that it cannot be harmonized with B&PC § 7099.6. Petition for Rehearing, at 7-10.

17. On August 18, 2009, the Court of Appeal, without giving any reasons, denied the Petition for Rehearing. Pet. App. 16a. The Court of Appeal then certified the Opinion for publication. Pet. App. 17a.

18. On September 18, 2009, Owen filed a timely Petition for Review to the California Supreme Court. In his Petition, Owen argued:

> B&PC § 7090.1 is unconstitutional. Petition for Review, at 10-12.
>
> The parties and Court of Appeal failed to consider the significance of B&PC § 7099.6. Petition for Review, at 12-18.
>
> B&PC § 7090.1 is unconstitutional to the extent that it cannot be harmonized with B&PC § 7099.6. Petition for Review, at 18-21.

B&PC § 7099.6 is unconstitutional to the extent that it cannot be harmonized with B&PC § 7090.1. Petition for Review, at 21.

The Registrar violated Owen's Due Process Rights under the Fourteenth Amendment to the United States Constitution. Petition for Review, at 22-25.

19. On November 19, 2009, the *en banc* California Supreme Court, without giving any reasons, denied the Petition for Review. Pet. App. 1a.

REASONS FOR ALLOWANCE OF THE WRIT

Mr. Owen's contractor's license has been revoked by operation of law because the Registrar of Contractors believed that Owen may have violated several provisions of the Contractors' State License Law. The Court of Appeal concluded that "the preponderance [of the evidence] standard [of proof] was appropriate in the citation proceeding because the only potential sanctions were orders of correction and civil penalties." Pet. App. 5a (Opinion, at 3). The Court of Appeal also noted that the higher standard of proof (clear and convincing evidence to a reasonable certainty) would apply in a proceeding seeking the suspension or revocation of a contractor's license. Pet. App. 6a (Opinion, at 4).

The crux of this case is that the contractor citation procedures allow the Registrar to circumvent a contractor's fundamental vested right in maintaining his license, which is protected by the due process clause of the Fourteenth Amendment to the United States Constitution. The thrust of Owen's arguments supported a conclusion that if all of the citation procedures were complied with under B&PC §§ 7099-7099.11, due process was satisfied. In the pres-

ent case, not all of the procedures were complied with, and as a result, Owen's professional license was unconstitutionally revoked. Had the Court of Appeal ruled that B&PC § 7090.1 was unconstitutional, or that not all of the citation procedures were complied with, a different outcome most likely would have occurred.

For some unexplained reason, the Superior Court Judge, three Appellate Court Justices, and seven Supreme Court Justices all ignored Owen's constitutional rights under the Fourteenth Amendment to the United States Constitution.[2] Hopefully, this Court will protect those rights. "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights." Rogers v. Alabama, 192 U.S. 226, 230 (1904).

The Court may wish to remand the case to the California Supreme Court to first rule on the constitutional issues, given this Court's busy schedule.[3] The California Courts are no doubt competent to rule on the federal constitutional issues raised by Owen. Owen trusts that the Court would grant the petition to protect his constitutional rights.

This Court should grant the Petition for Writ of Certiorari because this *now* published case presents

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[2] Article VI, Section 14 of the California Constitution provides in relevant part: "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."

[3] "We ordinarily do not decide in the first instance issues not decided below." Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 109 (2001) (*per curiam*) (internal quotation marks omitted).

an important issue of first impression in the State of California that needs to be settled correctly as it affects the constitutional rights of contractors in all future disciplinary proceedings. There are currently "more than 316,000 licensed contactors in the state." Attachment to California Supreme Court Petition for Review (homepage of Contractors' State License Board website).

I. CALIFORNIA CONTRACTOR DISCIPLINARY LAW

The problem with this published Opinion is that it allows the Registrar to accomplish the same result as an accusation seeking suspension or revocation of a contractor's license without ever having to prove by clear and convincing evidence to a reasonable certainty that the contractor has violated any sections of the Contractors' State License Law. All that is established in a citation proceeding is that probable cause exists to believe that the contractor has violated a disciplinary statute.

The California statutes involving contractor disciplinary proceedings can be found at B&PC §§ 7090-7124.6, as well as certain sections of the Government Code ("GC"). The Court of Appeal summarized some of these relevant provisions. Pet. App. 6a-8a (Opinion, at 4-5). This case involves the interplay of a number of these statutes. Certain critical words or phrases have been highlighted.

The Registrar generally has the power to "**cite**, temporarily suspend, or permanently revoke any license . . . **if** the . . . licensee . . . **is guilty** of or **commits** any one or more of the acts or omissions constituting causes for disciplinary action." Pet. App. 6a (Opinion, at 4 (citing B&PC §§ 7090 and 7095)).

In seeking to temporarily suspend or permanently revoke a contractor's license, the Registrar would first file an accusation pursuant to GC § 11503. GC § 11503 provides that "[a] hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation." Pet. App. 8a (Opinion at 5 n. 2). The Court of Appeal acknowledged that the clear and convincing evidence standard of proof would be appropriate "in a proceeding seeking suspension, or revocation of a contractor's license." Pet. App. 6a (Opinion at 4). The Court relied on "*Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 605[4] [noting that ALJ applied clear and convincing evidence standard in licensed contractor disciplinary hearing without addressing whether the higher standard was required]." *Ibid.*

"A subset of statutes, however, provides for citation proceedings with more limited remedies. (§§ 7099-7099.11.)" Pet. App. 6a (Opinion at 4). "If, upon investigation, the Registrar has **probable cause to believe** that a licensee . . . has committed any acts or omissions which are grounds for . . . revocation, or suspension of license, he or she may, in lieu of proceeding pursuant to this article, issue a citation to the licensee . . . . Each citation may contain *an order of correction* . . . fixing a reasonable time for correction of the violation or *an order . . . for payment* of a specified sum to an injured party in lieu of correction, and may contain an assessment of a *civil penalty*." Pet. App. 6a-7a (Opinion at 4 (referring to B&PC § 7099) (italics added by Court)).

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[4] This is a typical citation format in California where the year of the decision follows the case name.

"If the licensee appeals a citation, the Registrar must afford an opportunity for a hearing [commencing with GC § 11500] and 'thereafter issue a decision, based on findings of fact affirming, modifying, or vacating the citation or penalty, or directing other appropriate relief.' §§ 7099.3, 7099.5." Pet. App. 7a (Opinion at 4). If the licensee fails to contest the citation, "the citation shall be deemed a final order of the registrar and not subject to review by any court or agency." B&PC § 7099.4. "The failure of a licensee to comply with a citation after it is final is **a ground for suspension or revocation** of license." B&PC § 7099.6.

B&PC § 125.9(a) provides that "any board . . . may establish, by regulation, a system for the issuance to a licensee of a citation which may contain and order of abatement or an order to pay an administrative fine assessed by the board . . . where the licensee is in violation of the applicable licensing act or any regulation adopted pursuant thereto." The board shall provide the licensee with notice and an opportunity for hearing commencing with GC § 11500 to contest the citation. B&PC § 125.9(b)(4). "If a hearing is not requested pursuant to this section, **payment of any fine shall not constitute an admission of the violation charged**." *Ibid.*

B&PC § 7090.1(a)(1) provides that the "failure to pay a civil penalty, or to comply with an order of correction or an order to pay a specified sum to an injured party in lieu of correction once the order becomes final, **shall result in the automatic suspension of a license by operation of law** 30 days after noncompliance with the terms of the order." B&PC § 7090.1(a)(4) provides that "[r]einstatement may be made at any time following the suspension

by complying with the final order of the citation. If no reinstatement of the license is made within 90 days of the date of the automatic suspension, the cited license . . . **shall be automatically revoked by operation of law** . . . ."

II. B&PC § 7090.1 IS UNCONSTITUTIONAL

Notwithstanding Owen's repeated requests, the issue of whether B&PC § 7090.1 is constitutionally valid has been ignored by the California Courts. The issue is inextricably intertwined with the proper standard of proof in citation proceedings. More importantly, the issue is determinative of Owen's due process rights under the Fourteenth Amendment to the United States Constitution.

B&PC § 7090.1 provides for the automatic suspension of a contractor's license by operation of law as well as for the automatic revocation of a contractor's license by operation of law for failure to comply with the provisions of a citation. In the present case, Owen's failure to comply with the final penalty order on October 25, 2007, or final correction order by October 29, 2007,[5] resulted in the automatic suspension of his license on November 24, 2007,[6] and

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[5] CT 5:26-27 (paragraph 3 of the verified petition stating that Owen "has not complied with the civil penalty order and correction order."). ; CT 67:25-26 (Registrar admitting allegations of paragraph 3 of the verified petition).

[6] B&PC § 7090.1(a)(1) provides that "the failure to pay a civil penalty, or to comply with an order of correction . . . shall result in the automatic suspension of a license by operation of law 30 days after noncompliance with the terms of the order." The penalty order became final on October 25, 2007. CT 21. Thirty days after noncompliance would be November 24, 2007. Because Owen did not comply with the final civil penalty order on or before November 24, 2007, his license was suspended.

the automatic revocation of his license on February 22, 2008.[7]

The California Supreme Court has noted that "[i]t is axiomatic that the right of an individual to engage in any of the common occupations of life is among the several fundamental liberties protected by the due process and equal protection clauses of the Fourteenth Amendment." Hughes v. Board of Architectural Examiners (1998) 17 Cal.4th 763, 788-89. The Court cited the U.S. Supreme Court cases of *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957) and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), as well as the California Supreme Court cases of *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17 and *Bixby v. Pierno* (1971) 4 Cal.3d 130, 145, fn. 12. In *Schware*, this Court held that "[a] state cannot exclude a person form the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957).

The *Hughes* court recognized that "in the context of a variety of professions and vocations," "individuals, having obtained the license required to engage in a particular profession or vocation, ha[ve] a 'fundamental vested right' to continue in that activity." Hughes, 17 Cal.4th, at 788-89 (citations omitted). It has also been well-established "that procedural due

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[7] B&PC § 7090.1(a)(4) provides for the automatic revocation of the license 90 days after the license was automatically suspended if it is not reinstated "by complying with the final order of the citation." Ninety days after November 24, 2007 would be February 22, 2008. Because Owen has never complied with the final civil penalty order or final correction order, his license was automatically revoked by operation of law on February 22, 2008.

process of law requires a regulatory board or agency to prove the allegations of an accusation filed against a licensee by clear and convincing evidence rather than merely by a preponderance of the evidence." *Id.*, at 789 n. 9 (citations omitted). *See also* Viking Pools, Inc. v. Maloney (1989) 48 Cal.3d 602, 605 (contractor disciplinary action seeking revocation of license in which the Administrative Law Judge applied the "'clear and convincing evidence beyond a reasonable certainty' to sustain the charges.").

Significantly, B&PC § 7090.1 follows B&PC § 7090, which allows the Registrar to cite the licensee provided that the licensee is "guilty of or commits any one or more of the acts or omissions constituting causes for disciplinary action." All that has been established by the Registrar, by adopting the Proposed Decision of the ALJ, is that probable cause exists to believe that Owen may be guilty of or may have violated several provisions of the Contractors' State License Law. *See* B&PC § 7099. The ALJ merely noted that [probable] cause exists with respect to the six alleged violations of the Business and Professions Code. *See* CT 43, ¶ 3; CT 43, ¶ 4; CT 44, ¶ 5; CT 48, ¶ 6; CT 48, ¶ 7; CT 50, ¶ 8.

The automatic suspension and revocation provisions of B&PC § 7090.1 do not provide for a hearing in which the Registrar is required to prove the allegations of the citation by clear and convincing evidence to a reasonable certainty, and therefore, the statute does not comply with the due process clause of the Fourteenth Amendment. A hearing to prove the allegations contained in the citation would have undoubtedly required the Registrar to file an accusation in which he would have had to prove the allegations by clear and convincing evidence to a reason-

able certainty because of the dire consequences contained in B&PC § 7090.1.

The problem with this published Opinion is that it allows the Registrar to accomplish the same result as an accusation seeking suspension or revocation of a contractor's license without ever having to prove by clear and convincing evidence to a reasonable certainty that the contractor has violated any sections of the Contractors' State License Law. All that is established in a citation proceeding is that probable cause exists to believe that the contractor has violated a disciplinary statute.

What's disturbing about this case is that the Registrar will never have to file an accusation seeking the suspension or revocation of a contractor's license in which the Registrar has to prove by clear and convincing evidence to a reasonable certainty that a contractor has violated a provision of the Contractors' State License Law because the Registrar will now be able to accomplish the same result as an accusation seeking the suspension or revocation of a contractor's license by merely filing a citation in which the standard of proof to establish probable cause is the lower preponderance of the evidence as now established by the Court of Appeal in this published Opinion. Pet. App. 5a (Opinion at 3). This result is accomplished because of the interplay of the citation provisions under B&PC §§ 7099-7099.11 and the automatic suspension and revocation provisions under B&PC § 7090.1.

The Court of Appeal Opinion merely focused on the standard of proof required in a citation proceeding without considering the overall disciplinary scheme under B&PC §§ 7090-7124.6. The Court of

Appeal erroneously concluded that the preponderance of evidence standard is proper by improperly analyzing standards of review, which has nothing to do with standards of proof. Pet. App. 9a-10a (Opinion at 6-7). If this case is allowed to stand, the Registrar of Contractors will have a shortcut to resolving contractor disciplinary matters. "In FY 2007/08 CSLB obtained more than $35.2 million in ordered restitution for consumers." Attachment to California Supreme Court Petition for Review (homepage of Contractors' State License Board website). However, this short cut will come at a high price: the contractor's due process rights under the Fourteenth Amendment.

III. THE COURT OF APPEAL FAILED TO ADDRESS THE CONFLICT BETWEEN B&PC § 7090.1 AND B&PC § 7099.6

Subsequent to the filing of the Registrar's Brief, Owen discovered B&PC § 7099.6, which was the missing puzzle piece to making sense of the relationship between the citation provisions under B&PC § 7099 and the automatic suspension and revocation provisions under B&PC § 7090.1. B&PC § 7099 through B&PC § 7099.9 were all enacted under the same statute: Stats. 1979, c. 1013, §§ 17-26, pp. 3454-3455. When statutes are passed as part of the same bill and relate to the same subject matter, "[t]hey are, therefore, according to a well settled rule of interpretation, to be read together, as if parts of the same act." People v. Osorio (2008) 165 Cal.App.4th 603, 617 (citations omitted).

In the Opinion, the Court of Appeal failed to address the conflict between B&PC § 7090.1 and B&PC § 7099.6 which was raised by Owen in his Reply Brief, at 7-11, and Petition for Rehearing, at 3-7.

In light of Owen's discovery of B&PC § 7099.6, he submits that the following scenario clarifies and harmonizes the disciplinary scheme provided for in the Contractors' State License Law:

1. If the Registrar has probable cause to believe that a licensee has violated provisions of the Contractors' State License Law, the Registrar issues a citation in writing describing "with particularity the nature of the violation, including a reference to the provisions alleged to have been violated." B&PC § 7099. The citation may or may not contain an order of correction or assessment of civil penalties.

2. Whether or not the citation contains an order of correction or civil penalties, the licensee or applicant can either accept the citation or can appeal the allegations of the citation pursuant to B&PC § 7099.3. If the citation does not contain an order of correction or civil penalties, the licensee or applicant for a license would probably not appeal the citation.[8] If the citation contains an order of correction or civil penalties, the licensee can simply comply with the correction order and pay the civil penalties. Significantly, B&PC § 125.9(b)(4) provides that "[i]f a hearing is not requested pursuant to this section, payment of any fine shall not constitute an admission of the violation charged." Compliance with the correction order or payment of the civil penalty could be likened to a plea bargain, or a settlement of the allegations in lieu of the Registrar filing an accusation seeking suspension or revocation of the contractor's license.

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[8] However, there are other ramifications for not challenging a citation: The citation will remain on the contractor's public record for five years. *See* B&PC § 7124.6(c)(1).

3. Whether or not the citation contains an order of correction or civil penalties, if the licensee or applicant fails to timely appeal the citation, "the citation shall be deemed to be a final order of the registrar and not be subject to review by any court or agency" pursuant to B&PC § 7099.4. At this point, the contractor has no choice but to comply with a correction order and pay the civil penalties because of the automatic suspension and revocation provisions of B&PC § 7090.1.

Again, payment of any fine should not constitute an admission of the violations charged. At this point, the Registrar has not proven any violations of the Contractors' State License Law, however, noncompliance with the citation would result in the automatic suspension and automatic revocation of the contractor's license.

4. Whether or not the citation contains an order of correction or civil penalties, if the licensee or applicant appeals the citation pursuant to B&PC § 7099.3, the licensee or applicant will be afforded a hearing in accordance with the provisions of B&PC § 7099.5. The burden of proof is on the Registrar by a preponderance of the evidence, Pet. App. 5a (Opinion at 3) (holding that preponderance of evidence standard is appropriate in citation proceedings), to prove that probable cause exists to believe that the contractor or applicant may have violated the various statutes charged in the citation.

The Registrar then issues a decision, "based on findings of fact, affirming, modifying, or vacating the citation or penalty, or directing other appropriate relief." B&PC § 7099.5. The proceedings up to this point could be likened to a preliminary hearing in the

criminal context. Again, at this point, the Registrar has not proven anything, however, noncompliance with the citation would result in the automatic suspension and automatic revocation of the contractor's license under B&PC § 7090.1.

5. The Registrar's decision can be judicially reviewed by way of administrative mandamus in the Superior Court pursuant to CCP § 1094.5. *See also* GC § 11523.

6. The Superior Court's decision can then be appealed to the Court of Appeal pursuant to CCP § 1110.

7. Should the Court of Appeal affirm a Superior Court's affirmance of the Registrar's decision, the order becomes final which conclusively establishes that the licensee may have violated provisions of the Contractors' State License Law. Nothing more has been proven.

8. Assuming that a citation contains an order of correction or an assessment of civil penalties, a contractor or applicant who fails "to comply with a citation after it is final is a ground for suspension or revocation of license pursuant to B&PC § 7099.6(a), or "ground for denial of license pursuant to B&PC § 7099.6(b).

If paying a civil penalty assessment is not an admission of the violation(s) charged, it follows that not paying the civil penalties cannot be considered an admission of the violations charged, because the Registrar has still never proven that a violation has occurred.

9. It is suggested that at this point, the Registrar would have to make a determination of whether to file

an accusation pursuant to GC § 11503 as implicated by B&PC § 7099.6 to prove whether the contractor's license should be suspended or revoked for failing to comply with the citation. If the Registrar files an accusation, the Registrar has the burden of proof to prove by clear and convincing evidence to a reasonable certainty the allegations contained in the citation. Pet. App. 6a (Opinion, at 4) (requiring the higher standard of proof).

10. If the Registrar proves the allegations contained in the accusation by clear and convincing evidence to a reasonable certainty, then the failure to comply with the correction order or civil penalty would result in the automatic suspension or revocation of the contractor's license pursuant to B&PC § 7090.1 and B&PC § 7090 (contractor "guilty of or commits any one of the acts or omissions constituteing causes for disciplinary action.").

For example, Owen has always argued that the standard of proof for items 1 (B&PC § 7028 (misdemeanor)) and 6 (B&PC § 7125(b) (misdemeanor)) of the Citation should be proof beyond a reasonable doubt. CT 61-62 (argument to ALJ); CT 13-14 (argument to Superior Court); and Opening Brief, at 5-8 (argument to the Court of Appeal). If the attorney general was able to convict Owen of items 1 and 6 of the Citation in a criminal setting,[9] then the convictions could support a citation, a temporary suspension, or permanent revocation under B&PC § 7090.

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[9] B&PC § 7028.2 provides in part that "[a] criminal complaint pursuant to this chapter may be brought by the Attorney General or by the district attorney or prosecuting attorney of any city, in any county in the state with jurisdiction over the contractor or employer, by reason of the contractor's or employer's act, or failure to act, within that jurisdiction."

Unless Owen is convicted of the misdemeanors under items 1 and 6, or the Registrar proves by clear and convincing evidence the allegations under items 2 – 5 of the Citation, a citation under B&PC § 7099 is not proper.

However, the Court of Appeal reasoned that "[b]ecause the citation itself alleged that certain violations occurred, an affirmance of the citation finds that the violations in fact occurred, not that there is probable cause to believe they occurred." Pet. App. 12a (Opinion, at 8 n. 4) (emphasis added). If we accept this reasoning, then the Registrar has in fact found Owen guilty of two misdemeanors under items 1 and 6 of the Citation in which the proof beyond a reasonable doubt standard of proof applies. Presumably, the Registrar could then sentence Owen to jail for the misdemeanor convictions and/or fine him. *See* Penal Code ("PC") § 19 (allowing for six months imprisonment in the county jail and/or fine not exceeding one thousand dollars).

Moreover, "[a] criminal action, a proceeding by which a party charged with a public offense is accused and brought to trial and punished (Pen. Code, § 683), is prosecuted in the name of the People of the State of California, as a party, against the person charged with the offense (Pen. Code, § 684), who is designated as the defendant (Pen. Code, § 685). No Person can be punished for a public offense, except upon a legal conviction in a court having jurisdiction thereof (Pen. Code, § 681)." McComb v. Superior Court (1977) 68 Cal.App.3d 89, 97. The Registrar or the ALJ are not "a court with jurisdiction to legally convict and punish a person who is charged with a public offense." *Ibid*. Thus, they could not have con-

victed Owen of the misdemeanors under items 1 and 6 of the Citation.

Because failure to pay a fine or comply with a correction order is not an admission of the violations charged, and because the Registrar has no authority to convict a person of a criminal complaint, the Court of Appeal's remark that the Registrar, by affirming the ALJ's Proposed Decision, has proven the allegations of the citation is not correct. Pet. App. 12a (Opinion, at 8 n. 4). Likewise, because failure to pay a fine or comply with a correction order is not an admission of the violations charged, the Registrar has not proven the allegations under items 2 – 5 of the Citation under any standard of proof.

In light of the above scenario, and with due consideration given to B&PC § 7099.6, Owen agrees with the Court of Appeal that the Registrar has proven by a preponderance of the evidence that he may have violated six provisions of the Contractors' State License Law. However, unless an accusation seeking the suspension or revocation of Owen's license is filed pursuant to B&PC § 7099.6, B&PC § 7090.1 is not applicable. "When the Legislature provides that one law does not supersede another, the two are to be construed *together*." Drouet v. Superior Court (2003) 31 Cal.4th 583, 593 (italics in original) (citations omitted).

Because of this published Opinion, the Registrar now knows that he will never have to file an accusation seeking the suspension or revocation of a contractor's license in which the Registrar has to prove by clear and convincing evidence to a reasonable certainty that a contractor has violated a provision of the Contractors' State License Law because the

Registrar would be able to accomplish the same result as an accusation seeking the suspension or revocation of a contractor's license by merely filing a citation in which the standard of proof to establish probable cause is the lower preponderance of the evidence.

It's important to point out that a contractor has no choice but to comply with an order of correction or to pay the civil penalty because of the automatic suspension and revocation provisions under B&PC § 7090.1, notwithstanding the fact that the Registrar has proven nothing. Owen's contractor's license has been revoked by operation of law because the Registrar believed that Owen may have violated several provisions of the Contractors' State License Law.

IV. B&PC § 7090.1 IS UNCONSTITUTIONAL TO THE EXTENT THAT IT CANNOT BE HARMONIZED WITH B&PC § 7099.6

The Court of Appeal failed to consider that B&PC § 7090.1 is unconstitutional to the extent that it cannot be harmonized with B&PC § 7099.6. Reply Brief, at 7-11; Petition for Rehearing, at 7-10. This argument is merely an expansion of the query into the constitutional validity of B&PC § 7090.1, which was fully briefed by the parties before the Court of Appeal. Opening Brief, at 14-15; Respondent's Brief, at 11-15.

Owen's license has been revoked because he may have violated several provisions of the Contractors' State License Law. Owen's license cannot be automatically suspended or revoked under B&PC § 7090.1 until the Registrar first proves by clear and convincing evidence to a reasonable certainty the allegations contained in the Citation. This proof of the allega-

tions contained in the Citation can logically occur at the hearing contemplated by B&PC § 7099.6. "When two statutes touch upon a common subject, we must construe them in reference to each other, so as to harmonize the two in such a way that no part of either becomes surplusage." Garcia v. McCutchen (1997) 16 Cal.4th 469, 476 (quotations omitted). Moreover, "we do not construe statues in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness.'" Peracchi v. Superior Court (2003) 30 Cal.4th 1245, 1253 (citations omitted). B&PC § 7099.6 has to be accounted for in the scheme of disciplinary proceedings.

B&PC § 7099.6 directly follows and logically applies to B&PC § 7099.5, whereas B&PC § 7090.1 directly follows and logically applies to B&PC § 7090.[10] Thus, B&PC § 7099.6 specifically relates to a citation proceeding involving a probable cause determination, whereas B&PC § 7090.1 generally relates to a proceeding where the contractor "is guilty of or commits any one or more of the acts or omissions constituting cause for disciplinary action." B&PC § 7090. In other words, B&PC § 7099 applies to investigations involving probable cause determinations for violations of the Contractors' State License

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[10] B&PC §§ 7099.5 and 7099.6 were added as part of the same bill by Stats. 1979, c. 1013, §§ 22-23, pp. 3455. B&PC § 7090 was amended by Stats. 1984, c. 1174, § 6, p. 4018, and B&PC §7090.1 was added as part of the same bill by Stats. 1984, c. 1174, § 7, p. 4018. When statutes are passed as part of the same bill and relate to the same subject matter, "[t]hey are, therefore, according to a well settled rule of interpretation, to be read together, as if parts of the same act." People v. Osorio (2008) 165 Cal.App.4th 603, 617 (citations omitted).

Law, whereas B&PC § 7090 applies to actual criminal convictions and/or proven violations of the Contractors' State License Law.

When B&PC § 7090.1 was added by Stats. 1984, c. 1174, § 7, p. 4018, it provided that "[n]othwithstanding any other provisions of law, the failure to pay a civil penalty or comply with an order of correction once it has become final, shall be grounds for denial of, or the refusal to renew, a license. The unconstitutional automatic suspension and revocation provisions of B&PC § 7090.1 were not added until 1987. Stats. 1987, c. 831, § 1, p. 2658. What's noteworthy about the 1987 amendment is that "[t]he licensee may contest the determination of noncompliance within 15 days after service of the notice, by written notice to the registrar. Upon receipt of the written notice, the registrar may reconsider the determination or proceed with an accusation for violation of Section 7099.6." This language supports the scenario suggested by Owen that before a fine can be assessed or an order of correction becomes final, there has to be a hearing conducted in which the Registrar first proves the allegations contained in the citation under an accusation pursuant to B&PC § 7099.6 seeking the suspension or revocation of his license by clear and convincing evidence to a reasonable certainty.

In 1988, the reference to B&PC § 7099.6 was deleted. The sentence now reads: "Upon receipt of the written notice, the registrar may reconsider the determination and after reconsideration may affirm or set aside the suspension." Stats. 1988, c. 1619, §3, p. 5909. That procedure is not due process. Thus, the 1988 amendment to B&PC § 7090.1 eliminated the accusation hearing provision of GC § 11503 that

would have been provided for under B&PC § 7099.6. That amendment was unconstitutional and violated Owen's due process rights under the Fourteenth Amendment to the United States Constitution. To the extent that B&PC § 7090.1 cannot be harmonized with B&PC § 7099.6, it is invalid. To the extent that B&PC § 7090.1 cannot be harmonized with B&PC § 7099.6, the provisions of B&PC § 7099.6 which apply specifically to B&PC § 7099.5 would control over the provisions of B&PC § 7090.1 which apply generally to proven citations, suspensions, and revocations under B&PC § 7090. *See* Conservatorship of Moore (1986) 185 Cal.App.3d 718, 731 (recognizing that "it is a fundamental principle of statutory construction that in interpreting an interrelated statutory scheme, a specific provision controls a more general one.").

V. B&PC § 7099.6 IS UNCONSTITUTIONAL TO THE EXTENT THAT IT CANNOT BE HARMONIZED WITH B&PC § 7090.1

Another way of looking at this statutory conundrum is that the citation provisions under B&PC §§ 7099-7099.11 are not consistent with the automatic suspension and revocation provisions of B&PC § 7090.1. So as to be in harmony with B&PC §§ 7090 and 7090.1, the first sentence of B&PC § 7099 should read: If, upon investigation, a licensee, or an applicant for a license under this chapter, is guilty of or commits any acts or omissions which are grounds for denial, revocation, or suspension of license, he or she may, in lieu of proceeding pursuant to this article, issue a citation to the licensee or applicant. This minor change in the statute would require the Registrar to prove the allegations of the citation by clear and convincing evidence to a reasonable certainty. With this minor change to B&PC § 7099,

contractors could not complain that their due process rights had been violated.

VI. THE STANDARD OF PROOF IN A CITATION PROCEEDING IS CLEAR AND CONVINCING EVIDENCE TO A REASONABLE CERTAINTY

So as to avoid having to modify B&PC § 7099, or having to declare B&PC §§ 7099-7099.11 invalid, or having to declare B&PC § 7090.1 invalid, the simplest resolution would be to require that in citation proceedings, as with suspension and revocation proceedings, the Registrar is required to prove the allegations by clear and convincing evidence to a reasonable certainty. That would seem to avoid the constitutional issues raised by this case, as well as harmonizing the citation provisions under B&PC §§ 7099-7099.11 with the current automatic suspension and revocation provisions under B&PC § 7090.1.

VII. THE REGISTRAR VIOLATED OWEN'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Under the circumstances of the present case, Owen would have been much better off had the Registrar filed an accusation seeking the suspension or revocation of his license because the proceeding would have required the Registrar to prove the allegations of an accusation by clear and convincing evidence to a reasonable certainty. Moreover, the Registrar could still have imposed a correction order and possibly a penalty assessment under B&PC § 7095(c) (allowing for imposition of conditions to the suspension or revocation). That's exactly what happened in Ettinger v. Board of Medical Quality Assur-

ance (1982) 135 Cal.App.3d 853, and Viking Pools, Inc. v. Maloney (1989) 48 Cal.3d 602.

In *Ettinger*, an accusation was filed by the Board of Medical Quality Assurance, presumably seeking suspension or revocation of Ettinger's medical license. *See* Ettinger, 135 Cal.App.3d at 853. The Board suspended his "physician's and surgeon's certificate for one year but stayed the suspension and placed [him] on probation for a period of one year." *Ibid*. In *Viking Pools*, an accusation was filed by the Contractors' State License Board, presumably seeking suspension or revocation of Viking Pools' Contractors License. *See* Viking Pools, 48 Cal.3d at 605. "The judge's proposed decision ordered that Viking's license be revoked, with revocation stayed and probation imposed for three years upon certain conditions including restitution to the Ostroms. The registrar of contractors subsequently adopted this decision." *Ibid*.

In *Ettinger* and *Viking Pools*, the standard of proof seeking the suspension and/or revocation of the professional's license required the governing body to prove the allegations of the accusation by clear and convincing evidence to a reasonable certainty. *See* Ettinger, 135 Cal.App.3d at 856 (holding "that the proper standard of proof in an administrative hearing to revoke or suspend a doctor's license should be *clear and convincing proof to a reasonable certainty* and not a mere *preponderance of the evidence*.) (italics in original); Viking Pools, 48 Cal.3d at 605 (ALJ applying the "'clear and convincing evidence beyond a reasonable certainty' to sustain the charges.").

The main difference between *Ettinger* and *Viking Pools*, and *Owen v. Sands* is that in *Ettinger* and

Viking Pools, the governing body had to prove the allegations contained in the accusation, whereas in the present case the Registrar has not proven anything. Mr. Owen's contractor's license has been revoked by operation of law because the Registrar of Contractors believed that Owen may have violated several provisions of the Contractors' State License law.

The California Supreme Court has noted that "[i]t is axiomatic that the right of an individual to engage in any of the common occupations of life is among the several fundamental liberties protected by the due process and equal protection clauses of the Fourteenth Amendment." Hughes v. Board of Architectural Examiners (1998) 17 Cal.4th 763, 788 (citations omitted). "Consistent with that basic proposition, in the context of a variety of professions and vocations, we often have recognized that an individual, having obtained the license required to engage in a particular profession or vocation, has a 'fundamental vested right' to continue in that activity." *Id.* at 788-789 (citations omitted). "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). A hearing to suspend or revoke Owen's license would have admittedly required the Registrar to prove the allegations by clear and convincing evidence to a reasonable certainty.

By choosing to cite Owen instead of filing an accusation seeking the suspension or revocation of his license, the Registrar violated Owen's due process rights under the Fourteenth Amendment. The California Supreme Court has held "that procedural due process of law requires a regulatory board or agency to prove the allegations of an accusation filed against

a licensee by clear and convincing evidence rather than merely by a preponderance of the evidence." Hughes v. Board of Architectural Examiners (1998) 17 Cal.4th 763, 789 n. 9 (emphasis added) (citing *Ettinger* as well as other cases). The citation proceedings do not require the Registrar to prove anything. If this case is allowed to stand, the Registrar of Contractors will have a short cut to resolving contractor disciplinary matters. This short cut will come at a high price: the contractor's due process rights.

The California Supreme Court has also recognized that "unless the statute expressly provides to the contrary a license cannot be revoked without a hearing where the statute contemplates a quasi judicial determination by the administrative agency that there be cause for the revocation; that because of reasons of justice and policy the statute will be interpreted to require a hearing." Fascination, Inc. v. Hoover (1952) 39 Cal.2d 260, 271 (citations omitted). "Similarly, when a hearing is not explicitly required by law but compelled by due process considerations, administrative mandate will lie." Civil Service Com. v. Velez (1993) 14 Cal.App.4th 115, 118 (citation omitted). "The Fourteenth Amendment's guarantee of due process of law requires notice and an opportunity to be heard before an individual suffers governmental deprivation of a fundamental interest. Reed v. California Coastal Zone Conservation Com'n (1975) 55 Cal.App.3d 889, 895 (citing *Goldberg v. Kelley*, 397 U.S. 254 (1970)).

CONCLUSION

This case of first impression potentially affects over 316,000 contractors statewide and results in millions of dollars of restitution to affected consum-

ers. While it's commendable that the Registrar can expeditiously protect the public from incompetent or unscrupulous contractors, the flip side is that contractors have to be afforded a procedure that does not circumvent their due process rights under the Fourteenth Amendment. The simplest solution to avoid constitutional issues from reoccurring in the future is to require the Registrar to prove the allegations of a citation by clear and convincing evidence to a reasonable certainty before suspending or revoking a contractor's license by operation of law.

The Registrar would still be authorized to consider the possibility of proceeding with an accusation under B&PC § 7099.6. The Registrar would also be authorized to refer any possible criminal violations to the attorney general for prosecution. In any hearing conducted under B&PC § 7099.6 seeking the suspension or revocation of Owen's license, the standard of proof would be clear and convincing evidence to a reasonable certainty. In any criminal prosecution, the standard of proof would be proof beyond a reasonable doubt.

For all the above reasons, the petition for writ of certiorari should be granted; the California decisions vacated; and the case remanded for consideration of the constitutional issues in the first instance.

Respectfully submitted,

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APPENDIX

Court of Appeal, First Appellate District
Division Five – No. A121809

S176433

IN THE SUPREME COURT OF CALIFORNIA

En Banc

TIMOTHY J. OWEN, Plaintiff and Appellant,

v.

STEPHEN P. SANDS, as Registrar of Contractors, etc., Defendant and Respondent.

The petition for review is denied.

SUPREME COURT
FILED
Nov 19 2009
Frederick K. Ohlrich Clerk

Deputy

s/ *George*
Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

Court of Appeal
First Appellate District
FILED
JUL 28 2009
Diana Herbert, Clerk
By _____ Deputy Clerk

TIMOTHY J. OWEN,	)	
	)	
Plaintiff and Appellant,	)	
	)	A121809
v.	)	
	)	(Alameda
STEPHEN P. SANDS, as	)	County Super.
Registrar of Contractors, etc.,	)	Ct. No.
	)	RG07355155)
Defendant and Respondent.	)	
	)	

A licensed contractor was cited for six violations of state contractor law and ordered to pay civil penalties and compensation to the injured homeowner. He challenged the citation, which was upheld by the Registrar of Contractors after an administrative hearing at which the violations were found true by a preponderance of the evidence. The contractor argues the standard of proof should have been clear and convincing evidence. We conclude the agency applied the correct standard of proof. We also reject the contractor's contention that he was improperly convicted of criminal misdemeanors through an administrative proceeding, and his argument that the

administrative hearing was procedurally flawed because no accusatory pleading was filed.

BACKGROUND

The following facts are taken from the administrative law judge's findings, which are not disputed for purposes of this appeal. On June 28, 2005, Timothy J. Owen

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verbally agreed to replace 18 windows, install a sliding glass door, and replace the front door in a Kensington home for $19,000. He performed the work in July and August 2005, even though his contractor's license was not issued until September 2005. The homeowner asked other contractors to review the quality of Owen's work, and it was found deficient. When the homeowner confronted Owen on the matter, he became angry, demanded more money, and ultimately abandoned the project. The homeowner hired another contractor to correct and complete the work at a cost of $13,265.

The Registrar of Contractors (Registrar) issued a citation to Owen alleging six violations of the Business and Professions Code:**[fn1]** (1) engaging in the business of contractor without a license (§ 7028); (2) willfully and materially departing from trade standards of good workmanship (§ 7109); (3) failing to correct or complete a project for the stated contract price, causing the owner to secure the services of another contractor (§ 7113); (4) failing to include required provisions in the contract (§ 7159); (5) willfully or fraudulently acting in a manner that substantially injured another (§ 7116); and (6) falsely claiming a workers' compensation insurance exemption (§

7125, subd. (b)). The citation imposed civil penalties totaling $1,600 and an order of correction requiring Owen to pay the homeowner $7,880.79.

Owen contested the citation and a hearing was held before an administrative law judge (ALJ) of the Contractors' State License Board. Before the hearing commenced, Owen argued that the standard of proof at the hearing should be clear and convincing evidence, but the ALJ ruled the applicable standard of proof was preponderance of the evidence. Following four days of testimony, the ALJ found each of the alleged violations to be true, and increased the civil penalties to $2,000 after finding Owen's conduct was deceitful, grave and egregious. The Registrar adopted the ALJ's proposed decision in September 2007 and his decision became final in October.

[fn1] All statutory references are to the Business and Professions Code unless otherwise indicated.

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In November 2007, Owen filed a petition for administrative mandamus asking the court to set aside the decision on the ground that the ALJ applied the wrong standard of proof. (Code Civ. Proc., § 1094.5) After briefing, the trial court ruled that the preponderance of the evidence was the correct standard of proof and denied the petition.

DISCUSSION

Owen argues the ALJ applied the wrong standard of proof, that the ALJ improperly convicted him of misdemeanors without criminal jurisdiction, and that the hearing was procedurally flawed because it was not initiated with a formal accusatory pleading. Because only legal issues are raised on appeal, our

standard of review is de novo. (*Steinsmith v. Medical Board* (2000) 85 Cal.App.4th 458, 465 (*Steinsmith.*))

I. *Standard of Proof at the ALJ Hearing*

Owen argues the standard of proof required in all professional or vocational license disciplinary proceedings is clear and convincing proof to a reasonable certainty. We conclude the preponderance standard was appropriate in the citation proceeding because the only potential sanctions were orders of correction and civil penalties.

Owen relies on a line of cases holding that the clear and convincing evidence standard of proof applies in proceedings to restrict, suspend or revoke professional or vocational licenses. In the lead case of *Ettinger v. Board of Medical Quality Assurance*, the court held that "the proper standard of proof in an administrative hearing to revoke or suspend a doctor's license should be *clear and convincing proof to a reasonable certainty* and not a mere *preponderance of the evidence" (Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856 (*Ettinger).) Ettinger* in turn relied on cases holding that this heightened standard of proof applies in proceedings to disbar an attorney or to suspend or revoke a real estate license. (*Id.* at p. 855, citing *Furman v. State Bar* (1938) 12 Cal.2d 212, 229 (*Furman); Small v. Smith* (1971) 16 Cal.App.3d 450, 457 (*Small); Realty Projects, Inc. v. Smith* (1973) 32 Cal.App.3d 204, 212 (*Realty Projects);* see also *Kapelus v. State Bar* (1987) 44 Cal.3d 179, 184, fn.1 (*Kapelus);* cf. *San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1892-1895 [heightened standard of proof not required in proceeding to revoke nonprofessional food processing license]; *Mann v.*

Department of Motor Vehicles (1999) 76 Cal.App.4th 312, 318-320 [same with respect to vehicle salesperson's license].) Although Owen does not cite any case that holds the clear and convincing evidence standard of proof applies in a licensed contractor disciplinary proceeding, the Registrar does not dispute that the higher standard would apply in a proceeding seeking suspension, or revocation of a contractor's license.(See *Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 605 [noting that ALJ applied clear and convincing evidence standard in licensed contractor disciplinary hearing without addressing whether the higher standard was required].)

The question before us is whether the clear and convincing evidence standard also applies in a citation proceeding where the only proposed sanctions are a civil penalty or an order of correction, and which does not involve restriction, suspension, or revocation of a contractor's license. In the licensed contractor context, the Registrar generally has the power to "cite, temporarily suspend, or permanently revoke any license or registration if the . . . licensee . . . is guilty of or commits any one or more of the acts or omissions constituting causes for disciplinary action." (§ 7090; see also § 7095.) A subset of statutes, however, provides for citation proceedings with more limited remedies. (§§ 7099-7099.11.) "If, upon investigation, the registrar has probable cause to believe that a licensee . . . has committed any acts or omissions which are grounds for denial, revocation, or suspension of license, he or she may, in lieu of proceeding pursuant to this article, issue a citation to the licensee . . . . Each citation . . . may contain an *order of correction* fixing a reasonable time for

correction of the violation or *an order . . . for payment* of a specified sum to an injured party in lieu of correction, and may contain an assessment of a *civil penalty*." (§ 7099, italics added.) If the licensee appeals a citation, the Registrar must afford an opportunity for a hearing and "thereafter issue a decision, based on findings of fact, affirming, modifying, or vacating the citation or penalty, or directing other appropriate relief." (§ 7099.5; see § 7099.3.) Suspension or revocation of a license cannot be ordered unless certain procedural prerequisites, such as the filing of an

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accusation, are satisfied. (See, e.g., Gov. Code, § 11503.)[fn2].) Those procedures were not invoked here.

Neither party has cited, and we have not found, any case law that directly addresses the appropriate standard of proof in a citation proceeding such as that described in section 7099 et seq. Therefore, we look to the principles underlying the *Ettinger* line of cases for guidance on the issue.

In *Hughes v. Board of Architectural Examiners*, the Supreme Court linked the *Ettinger* cases to procedural due process principles.[fn3] (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 788-789.) "[W]e often have recognized that an individual, having obtained the license required to engage in a particular profession or vocation, has a `fundamental vested right' to continue in that activity. [Citations.] [¶] A licensee, having obtained such a fundamental vested right, is entitled to certain procedural protections greater than those accorded an applicant. For example, this court repeatedly has

held, with exceptions not pertinent here, that the `independent judgment'

[fn2] "A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief." (Gov. Code, § 11503.)

[fn3] The rationale of the *Ettinger* cases themselves is not entirely clear. *Furman* relies on a disbarment case in which the Supreme Court held clear and convincing evidence was required because of the quasi-criminal nature of the proceeding and because removing or suspending a person from the practice of his or her profession deprived the person of "`personal and property rights.'" (*Bar Asso. of San Francisco v. Sullivan* (1921) 185 Cal. 621, 623-624, cited in *Furman, supra*, 12 Cal.2d at p. 229.) *Ettinger*, *Realty Projects*, and *Small* followed *Furman* based on the similarities between disbarment proceedings and the professional disciplinary proceedings at issue in those cases. (*Ettinger, supra*, 135 Cal.App.3d at pp. 855-856; *Realty Projects, supra*, 32 Cal.App.3d at p. 212; *Small, supra*, 16 Cal.App.3d at pp. 457-458.)

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standard of review must be applied [in the trial court] to an administrative decision that substantially affects such a fundamental vested right. [Citations.]" (*Id.* at pp. 788-789.) "Similarly, it has been held that procedural due process of law requires a regulatory board or agency to prove the allegations of an accusation filed against a licensee by clear and convincing evidence rather than merely by a prepon-

derance of the evidence. (See, e.g., *Kapelus*[, *supra*, 44 Cal.3d at p.] 184, fn. 1 . . .; *Ettinger*[, *supra*, 135 Cal.App.3d at p.] 856 . . .; see also [citation].)" (*Id.* at p. 789, fn. 9.)

Although courts have not considered the appropriate standard of proof in administrative citation proceedings, courts have addressed the appropriate *trial court* standard of review (independent judgment or substantial evidence) with respect to citation proceedings. Because both procedural requirements derive from similar due process considerations, we take guidance from those cases, which have held that the heightened standard of review (independent judgment) does *not* apply. In *Handyman Connection of Sacramento, Inc. v. Sands*, the Third District held that the independent judgment standard of review did not apply on review of a citation proceeding where a licensed contractor was fined for four violations of the Contractors' State License Law (§ 7000 et seq.). (*Handyman Connection of Sacramento, Inc. v. Sands* (2004) 123 Cal.App.4th 867, 871, 880 (*Handyman.*)) The court explained, "In a case such as this one, where the only sanction imposed is a fine — not revocation, suspension, or restriction of the petitioner's license — no fundamental vested right is implicated and the trial court is not authorized to exercise independent judgment on the evidence." (*Id.* at p. 880.) *Handyman* followed *Steinsmith*, which similarly held that the independent judgment standard of review did not apply in a case where a physician was cited for aiding the unlicensed practice of medicine by others and merely fined $500. (*Steinsmith, supra*, 85 Cal.App.4th at pp. 460, 464-465.) *Steinsmith* in turn followed *Steve P. Rados, Inc. v. California Occupational Safety &*

Health Appeals Board, which so held in a case where a licensed contractor was cited for violating a construction safety order and assessed a civil penalty. (*Steve P. Rados, Inc. v. California Occupational Saf & Health Appeals Bd.* (1979) 89 Cal.App.3d 590, 593-594 (*Rados.*))

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Because *Hughes* indicates that application of the "independent judgment" standard of review and the "clear and convincing evidence" standard of proof both depend on the nature of the fundamental vested property right at issue in a licensee disciplinary case, we find the *Handyman*, *Steinsmith*, and *Rados* rationales persuasive as to the standard of proof applicable in citation proceedings. We conclude that, because the citation hearing on review could only result in civil penalties or correction orders, and could not have resulted in orders suspending, limiting, or revoking Owen's license, the preponderance of the evidence rather than the clear and convincing evidence standard of proof applied.

Owen, however, argues that the citation hearing is nonetheless a "disciplinary" hearing within the meaning of the statutory scheme and thus necessarily falls under the *Ettinger* rule. He correctly observes that the statutes governing citation proceedings are codified in an article of the Business and Professions Code entitled "Disciplinary Proceedings" (div. 3, ch. 9, art. 7; Stats. 1939, ch. 37, § 1, pp. 381, 389 [article heading enacted by Legislature]), that statutes in the article seem to use the term "disciplinary action" to include both citations and suspension, or revocation of a license (§ 7090), and that the ALJ at one point in his decision suggested he was imposing

"discipline." (§§ 7090, 7099-7099.11.) However, Owen is incorrect that the procedural safeguards the due process clause requires in an administrative proceeding are determined solely based on whether the proceeding is "disciplinary." Instead, the necessary procedural safeguards are determined through a balancing test, which includes assessing the weight of "`the private interest that will be affected by the official action. . . .'" (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 546.) In the public employment context, the court has held that "civil service employees upon whom short suspensions had been imposed for disciplinary reasons were not entitled to full procedural presuspension protection of the kind provided before termination of employment. (See *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.)" (*Id.* at p. 564.) Similarly, we join the *Handyman, Steinsmith*, and *Rados* courts in concluding that licensed contractors cited for violations and subject only to sanctions such as correction orders or monetary penalties are not entitled to the same procedural

safeguards afforded to contractors who face restriction, suspension, or revocation of their licenses.

Owen argues that his citation proceeding was equivalent to a disciplinary proceeding that could result in suspension or revocation of his license because if he fails to pay the fines and penalties assessed by the Registrar his license will be suspended or revoked by operation of law.[fn4] (See § 7090.1.) We disagree. That the Registrar can enforce the correction orders and penalties in this manner[fn5] does not change the fact that the greatest sanction that could be imposed in the citation pro-

ceeding itself was a fine or penalty, not suspension or revocation of his license. Critically, Owen does not argue that the fines and penalties imposed were so burdensome as to be tantamount to a suspension or revocation of his license.[fn6]

[fn4] Alternatively, Owen argues the preponderance of the evidence standard is acceptable at the citation hearing if the issue to be decided at the hearing is limited to whether there was probable cause to believe the alleged violations occurred, and that a hearing on whether the violations actually occurred would take place later and would be subject to a clear and convincing evidence standard of proof. We disagree with this creative interpretation of the statutory scheme. Section 7099 authorizes the Registrar to *issue* a citation upon probable cause to believe a violation has occurred. (§ 7099.) The citation alleges an actual violation: "Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provisions alleged to have been violated." (*Ibid.*) After the hearing, the Registrar decides based on findings of fact whether to affirm, modify or vacate the citation. (§ 7099.5.) Because the citation itself alleged that certain violations occurred, an affirmance of the citation finds that the violations in fact occurred, not that there is probable cause to believe they occurred.

[fn5] In December 2008, Owen asked us to take additional evidence pursuant to Code of Civil Procedure section 909 of the Registrar's suspension of his license for failure to comply with the citation order he is challenging in this appeal. He also asked us to take judicial notice of an official record of the revocation of his license on August 25, 2008, for failure to comply with the same order. In January 2009, we denied the motion to take additional evidence and deferred a ruling on the request for judicial notice. We now deny the request for judicial notice because events that take place after entry of the final administrative order under review are outside the proper scope of our review. (See *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.)

[fn6] Owen suggests that he would have had to forfeit his right to appeal the trial court's decision (by satisfying the correction order and penalty assessment) in order to

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We conclude the ALJ properly applied the preponderance of the evidence standard of proof at Owen's citation hearing.

II. ***Criminal Jurisdiction***

Owen argues the ALJ effectively convicted him of two misdemeanors when it found he violated sections 7028 and 7125, and that it acted unlawfully in doing so because it had no jurisdiction over criminal prosecutions. This argument lacks merit.

Owen correctly observes that sections 7028 and 7126 (which refers back to §§ 7125-7125.4) define misdemeanor crimes, which may only be prosecuted in a criminal court. However, the code also expressly authorizes the Registrar to cite individuals for violating the statutory prohibitions. Section 7028, subdivision (a), provides, "It is a misdemeanor for any person to engage in the business or act in the capacity of a contractor within this state without having a license therefor, unless the person is particularly exempted from the provisions of this chapter." (8) Section 7028.2 authorizes a criminal complaint to be filed only by the Attorney General, a district attorney or a prosecuting attorney for a city. However, section 7028.6 authorizes and section 7028.7 *requires* the Registrar to cite an individual if the Registrar has probable cause to believe the individual is acting as a contractor without a license and expressly provides, "The sanctions authorized under this section shall be separate from, and in addition to, all other remedies either civil or criminal." (*Ibid.*)

Similarly, section 7125 requires the Contractors' State License Board to require contractors to file cer-

tificates of workers' compensation insurance unless specifically exempted by statute, and section 7126 provides that a licensee who fails to comply with such a requirement is guilty of a misdemeanor. However, section 7125.2, subdivision (d), provides that "with respect to an unlicensed individual acting in the

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avoid suspension or revocation of his license, but the case he cites refutes his contention. (See *Ryan v. California Interscholastic Federation* (2001) 94 Cal.App.4th 1033, 1040 ["compliance or satisfaction [of a judgment] that is compelled does not constitute a waiver of the right to appeal. Such a waiver is implied only where the satisfaction or compliance is the product of compromise or is coupled with an agreement not to appeal."].)

capacity of a contractor who is not otherwise exempted from the provisions of this chapter, a citation may be issued by the registrar under Section 7028.7 for failure to comply with this article and to maintain workers' compensation insurance."

Owen argues that if the Registrar intended to proceed under sections 7028.7 and 7125.2, he should have cited Owen under those statutes rather than for violating sections 7028 and 7125. However, the statutes cited by the Registrar describe the statutory requirements Owen allegedly violated. Sections 7028.7 and 7125.2 merely authorize the Registrar to sanction the violations by way of a citation. The citations appropriately put Owen on notice of the violations he allegedly committed.

III. *Failure to File an Accusation*

Owen argues the Registrar's decision must be set aside because he failed to file an accusation to initi-

ate the hearing before the ALJ. This argument is forfeited because Owen did not raise the argument in the administrative proceeding or in the trial court. [fn7] (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) In any event, the argument lacks merit. Owen correctly notes that hearings on contested citations must be conducted in accordance with the Administrative Pro cedure Act's procedures for administrative adjudications. (§ 7099.5; Gov. Code, § 11500 et seq.) He argues that Government Code section 11503 requires the filing of an accusation to initiate the hearing. However, that statute only requires the filing of an accusation to initiate a "hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned." (*Ibid.*) As already explained, the citation proceeding did not seek restriction, suspension, or revocation of Owen's license.

DISPOSITION

The judgment is affirmed. Owen shall pay the Registrar's costs on appeal.

[fn7] Owen represents that he raised the issue in a reply brief he filed in the trial court, but that brief is not included in the appellate record.

Bruiniers, J.*

We concur:

Simons, Acting P. J.

Needham, J.

[fn*] Judge of the Contra Costa Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

COURT OF APPEAL
FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 5

Court of Appeal, First Appellate District
FILED
AUG 18 2009
Diana Herbert
By _____ Deputy Clerk

TIMOTHY J OWEN
Plaintiff and Appellant,
v.
STEPHEN P SANDS
Defendant and Respondent.

A121809
Alameda County No. RG07355155

BY THE COURT:

The petition for rehearing is denied.

Date: AUG 18 2009 JONES, P.J.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

Court of Appeal, First Appellate District
FILED
AUG 18 2009
Diana Herbert
By _____ Deputy Clerk

TIMOTHY J OWEN Plaintiff and Appellant, v. STEPHEN P SANDS, as Registrar of Contractors, etc., Defendant and Respondent.	A121809 (Alameda County Supr. Ct. No. RG07355155)

BY THE COURT:

The written opinion filed on July 28, 2009, is certified for publication pursuant to rule 8.1105(b) of the California Rules of Court, and it is ordered published in the official reports.

Date: AUG 18 2009 JONES, P.J.

Timothy J. Owens
4061 E. Castro Valley Blvd. # 268
Castro Valley, CA 94552

Stephen P. Sands

Superior Court of California
County of Alameda
Rene C. Davidson Alameda County Courthouse

Owens Plaintiff/Petitioner(s) VS. Sands Defendant/Respondent(s) (Abbreviated Title)	No. RG07355155 Order Petition for Writ Denied

The Petition for Writ was set for hearing on 03/13/2008 at 09:00 AM in Department 31 before Honorable Frank Roesch. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: The Petition of Timothy Owen ("Petitioner") for Administrative Mandamus (CCP § 1094.5); Request for Stay of Registrar's Decision (CCP § 1094.5(h)) is Denied.

The Administrative Law Judge ("ALJ") correctly applied the preponderance of the evidence standard of proof to the subject citation proceedings. (See Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal.App.3d 853, 855-858; see also Cal.

Administrative Mandamus (Cont. Ed. Bar 3rd ed. 2007.))

The "clear and convincing" standard is an exception to the general "preponderance of evidence" standard in civil proceedings and applies in cases where the revocation or suspension of a professional license is sought. (Ibid.) Here, the Registrar of Contractors issued a citation that did not seek to suspend or revoke Petitioner's professional license, but sought to impose an order for correction or fines or civil penalties. Thus, Petitioner's reliance on Viking Pools, Inc. v. Maloney (1989) 48 Cal.3d 602, 605 is unavailing as that case involved an accusation seeking revocation.

The criminal standard of proof, beyond a reasonable doubt, does not apply to license revocation proceedings (see Hughes v. Board of Architectural Exam'rs (1998) 17 Cal.4th 763, 784), let alone here. Administrative proceedings are civil rather than criminal in nature. (See Petrucci v. Board of Medical Examiners (1975) 45 Cal.App.3d 83, 88)

Petitioner's request for a stay of the Respondent's decision in this matter pursuant to CCP § 1094.5(h) is DENIED as moot.

Dated: 03/13/2008 *s/ **Frank Roesch***
Judge Frank Roesch

Order

CALIFORNIA STATUTES

BUSINESS AND PROFESSIONS CODE

Section 125.9. (a) Except with respect to persons regulated under Chapter 11 (commencing with Section 7500), and Chapter 11.6 (commencing with Section 7590) of Division 3, any board, bureau, or commission within the department, the board created by the Chiropractic Initiative Act, and the Osteopathic Medical Board of California, may establish, by regulation, a system for the issuance to a licensee of a citation which may contain an order of abatement or an order to pay an administrative fine assessed by the board, bureau, or commission where the licensee is in violation of the applicable licensing act or any regulation adopted pursuant thereto.

(b) The system shall contain the following provisions:

* * * * *

(4) A citation or fine assessment issued pursuant to a citation shall inform the licensee that if he or she desires a hearing to contest the finding of a violation, that hearing shall be requested by written notice to the board, bureau, or commission within 30 days of the date of issuance of the citation or assessment. If a hearing is not requested pursuant to this section, payment of any fine shall not constitute an admission of the violation charged. Hearings shall be held pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Section 7090. The registrar may upon his or her own motion and shall upon the verified complaint in writing of any person, investigate the actions of any

applicant, contractor, or home improvement salesperson within the state and may deny the licensure or the renewal of licensure of, or cite, temporarily suspend, or permanently revoke any license or registration if the applicant, licensee, or registrant, is guilty of or commits any one or more of the acts or omissions constituting causes for disciplinary action.

The registrar may proceed to take disciplinary action as in this article provided against an applicant or a person licensed or registered under the provisions of this chapter even though the grounds or cause for such disciplinary action arose upon projects or while the applicant, licensee, or registrant was acting in a capacity or under circumstances or facts which, under the provisions of Sections 7044, 7045, 7046, and 7048, would otherwise exempt the person or his or her operations from the provisions of this chapter.

Notwithstanding any provision of this chapter, if the registrar finds that any contractor licensed or registered under the provisions of this chapter has willfully and deliberately violated any state or local law relating to the issuance of building permits, other than failure to obtain a county or city permit for repair, maintenance, and adjustment of equipment where such repair, maintenance, or adjustment is valued at less than fiv hundred dollars ($500) for labor or materials, or where the repair of a part or component part of mechanical equipment consists of replacing such part or component part of mechanical equipment in need of repair with the identical part or component part, the registrar shall take disciplinary action against the contractor's license in accordance with this chapter.

For the purpose of this section, there shall be a rebuttable presumption affecting the burden of proof that construction performed without a permit is a willful and deliberate violation.

Section 7090.1. (a) (1) Notwithstanding any other provisions of law, the failure to pay a civil penalty, or to comply with an order of correction or an order to pay a specified sum to an injured party in lieu of correction once the order has become final, shall result in the automatic suspension of a license by operation of law 30 days after noncompliance with the terms of the order.

(2) The registrar shall notify the licensee in writing of the failure to comply with the final order and that the license shall be suspended 30 days from the date of the notice.

(3) The licensee may contest the determination of noncompliance within 15 days after service of the notice, by written notice to the registrar. Upon receipt of the written notice, the registrar may reconsider the determination and after reconsideration may affirm or set aside the suspension.

(4) Reinstatement may be made at any time following the suspension by complying with the final order of the citation. If no reinstatement of the license is made within 90 days of the date of the automatic suspension, the cited license and any other contractors' license issued to the licensee shall be automatically revoked by operation of law for a period to be determined by the registrar pursuant to Section 7102.

(5) The registrar may delay, for good cause, the revocation of a contractor's license for failure to comply with the final order of the citation. The delay in the

revocation of the license shall not exceed one year. When seeking a delay of the revocation of his or her license, a licensee shall apply to the registrar in writing prior to the date of the revocation of the licensee's license by operation of law and state the reasons that establish good cause for the delay. The registrar's power to grant a delay of the revocation shall expire upon the effective date of the revocation of the licensee's license by operation of law.

(b) The cited licensee shall also be automatically prohibited from serving as an officer, director, associate, partner, or qualifying individual of another licensee, for the period determined by the registrar, and the employment, election, or association of that person by a licensee shall constitute grounds for disciplinary action. Any qualifier disassociated pursuant to this section shall be replaced within 90 days of the date of disassociation. Upon failure to replace the qualifier within 90 days of the prohibition, the license of the other licensee shall be automatically suspended or the qualifier's classification removed at the end of the 90 days.

Section 7099. If, upon investigation, the registrar has probable cause to believe that a licensee, or an applicant for a license under this chapter, has committed any acts or omissions which are grounds for denial, revocation, or suspension of license, he or she may, in lieu of proceeding pursuant to this article, issue a citation to the licensee or applicant. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provisions alleged to have been violated. In addition, each citation may contain an order of correction fixing a reasonable time for correction of the violation or an order, against the licensee

only, for payment of a specified sum to an injured party in lieu of correction, and may contain an assessment of a civil penalty.

Section 7099.1. The board shall promulgate regulations covering the formulation of an order of correction which gives due consideration to the time required to correct and the practical feasibility of correction.

Section 7099.2. (a) The board shall promulgate regulations covering the assessment of civil penalties under this article which give due consideration to the appropriateness of the penalty with respect to the following factors:

(1) The gravity of the violation.

(2) The good faith of the licensee or applicant for licensure being charged.

(3) The history of previous violations.

(b) Except as otherwise provided by this chapter, no civil penalty shall be assessed in an amount greater than five thousand dollars ($5,000). A civil penalty not to exceed fifteen thousand dollars ($15,000) may be assessed for a violation of Section 7114 or 7118.

Section 7099.3. Any licensee or applicant for licensure served with a citation pursuant to Section 7099, may appeal to the registrar within 15 working days from service of the citation with respect to violations alleged by the registrar, correction periods, amount of penalties, and the reasonableness of the change required by the registrar to correct the condition.

Section 7099.4. If within 15 working days from service of the citation issued by the registrar, the licensee or applicant for licensure fails to notify the

registrar that he or she intends to contest the citation, the citation shall be deemed a final order of the registrar and not be subject to review by any court or agency. The 15-day period may be extended by the registrar for cause.

Section 7099.5. If a licensee or applicant for licensure notifies the registrar that he or she intends to contest a citation issued under Section 7099, the registrar shall afford an opportunity for a hearing. The registrar shall thereafter issue a decision, based on findings of fact, affirming, modifying, or vacating the citation or penalty, or directing other appropriate relief. The proceedings under this section shall be conducted in accordance with the provisions of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the registrar shall have all the powers granted therein.

Section 7099.6. (a) The failure of a licensee to comply with a citation after it is final is a ground for suspension or revocation of license.

(b) The failure of an applicant for licensure to comply with a citation after it is final is a ground for denial of license.

Section 7099.7. No order for payment of a civil penalty shall be made against any bond required pursuant to Sections 7071.5 to 7071.8.